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The Right to a Mechanic's Lien in Ohio: *A Survey*

A MECHANIC'S LIEN is a "claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings erected thereon."¹ There was no common law lien on realty equivalent to that on personalty,² thus leaving a builder or supplier without security to insure payment for his efforts. The right to a lien on the realty for work done thereon has been created entirely by statute,³ and the character, operation, and extent of the lien right must be ascertained solely from the statute which creates and defines it.⁴ The remedy, however, is not exclusively legal but rather is said to rest upon broad principles of equity.⁵ The statutes conferring the lien right have been considered to be founded upon the equitable principle at common law which gave to every bailee for hire a lien upon the bailed goods for the reasonable value of his labor and skill which imparted additional value to those goods.⁶

This Note is directed toward an inspection of the basic right to a mechanic's lien and of the statutory requirements with which the lienor must comply in order to perfect that right.⁷ Although the underlying purpose of the mechanic's lien is to protect the principal

¹ Van Stone v. Stillwell & Bierce Mfg. Co., 142 U.S. 128, 136 (1891).

² Building materials, being personalty, became part of the realty when attached thereto. Park v. Williamson Heater Co., 20 Ohio N.P. (n.s.) 150, 158 (C.P. 1917), *aff'd*, 35 Ohio C.C. Dec. 517 (1918).

³ Mahoning Park Co. v. Warren Home Dev. Co., 109 Ohio St. 358, 364, 142 N.E. 883, 885 (1924).

⁴ Black River Lumber Co. v. Kent, 124 Ohio St. 20, 22, 176 N.E. 662, 663 (1931).

⁵ Eggar v. Corwin, 8 Ohio App. 313, 326 (1917); Park v. Williamson Heater Co., 20 Ohio N.P. (n.s.) 150, 159 (C.P. 1917), *aff'd*, 35 Ohio C.C. Dec. 517 (1918).

⁶ See Thomas v. Huesman, 10 Ohio St. 152 (1859). The reader should note that a mechanic's lien statute is not analogous to either the particular lien of an artisan, which is a bare right to hold the chattel until payment, or to the general lien known to the common law which secured a general balance of accounts. Further, a mechanic's lien, which affects only the property on which the work is done, obviously differs from a judgment lien, which affects all of the debtor's property subject to the lien. See generally PHILLIPS, MECHANICS' LIENS § 10 (2d ed. 1883).

⁷ For a comprehensive analysis of the entire Ohio Mechanic's Lien Law, see DEMANN, THE OHIO MECHANIC'S LIEN LAW (1953, Supp. 1966) [hereinafter cited as DEMANN]; DEWITT, THE OHIO LAW OF MECHANICS LIENS AND LABORER'S PREFERENCES (1931, Holmes Supp. 1950) [hereinafter cited as DEWITT]; KNEPPER & RICHARDS, THE OHIO MANUAL OF GENERAL PRACTICE § 20 (1956); 36 OHIO JUR. 2D *Mechanics' Liens* (1959, Supp. 1966). For a general survey on mechanics' liens, see PHILLIPS, *op. cit. supra* note 6, §§ 1-512; ROCKEL, MECHANICS' LIENS (1909).

contractors from default by the owner and to protect the subcontractors, materialmen, and laborers from default by the principal contractor, it must be kept in mind that the burden of compliance rests upon the party seeking to invoke the benefit of the statute. A qualified right is thus created, and, in this sense, the owner receives the incidental benefit of knowing the absolute extent of his liability. An understanding of the Mechanic's Lien Law⁸ is important in order to perfect and protect the respective rights of lienors and owners alike.

I. ORIGIN AND HISTORY OF MECHANICS' LIENS

The need to grant mechanics and materialmen the right to a lien upon the land and the buildings erected thereon was recognized as early as 1791, when the General Assembly of Maryland, in response to the recommendations of James Madison and Thomas Jefferson, enacted the first mechanic's lien statute in order to expedite the construction of Washington, D.C.⁹ The benefit of the statute was thus directed toward the builders and artisans whose skills were so important to the development of our early economy. It was necessary to provide some degree of security to insure payment for the work performed and to dispel anxieties about the landowners' credit.

The first similar legislation in Ohio was enacted by the city of Cincinnati in 1823¹⁰ and was followed by the adoption of a general Mechanic's Lien Law in 1843.¹¹ However, the statute, as enacted, granted a lien upon the real property to only those persons who performed labor or furnished materials under or by virtue of a contract with the owner or his authorized agent. Under the Act of 1894,¹² this right was extended to include laborers, materialmen, and subcontractors. The elimination of any privity requirement immediately rendered the act subject to question, and it was thereafter found unconstitutional as a misappropriation of the owner's

⁸ OHIO REV. CODE ch. 1311.

⁹ PHILLIPS, *op. cit. supra* note 6, § 7, at 12. See also *Park v. Williamson Heater Co.*, 20 Ohio N.P. (n.s.) 150, 158 (C.P. 1917), *aff'd*, 35 Ohio C.C. Dec. 517 (1918).

¹⁰ 21 Ohio Laws 8. In 1833 (31 Ohio Laws 88) and in 1840 (38 Ohio Laws 115), the territorial operation and effect of the legislation was extended to encompass surrounding counties. See also 36 OHIO JUR. 2D *Mechanics' Liens* § 5 (1959).

¹¹ 41 Ohio Laws 66.

¹² 91 Ohio Laws 135.

property.¹³ The ensuing public pressure and judicial inconsistency¹⁴ led to an amendment of the Ohio Constitution in 1912 giving the legislature power to establish mechanic's lien laws.¹⁵ Pursuant to its newly founded constitutional authority, the legislature passed such laws in 1913¹⁶ and in 1915.¹⁷ All doubt has since been removed as to the constitutional validity of giving a direct right against property to one not in privity with the owner thereof¹⁸ or of conferring unlimited authority upon the General Assembly to legislate concerning mechanics' liens.¹⁹

The simple right initially granted to the small builder in a modest economic environment still exists today in the basic Mechanic's Lien Law, as embodied in sections 1311.01 to 1311.37 of the Ohio Revised Code. While the purpose of the mechanic's lien remains unchanged, the scope of the right has been altered to satisfy modern needs. The simple right has become far more complex and has been extended to include mine workers,²⁰ workers under public construction contracts,²¹ subcontractors,²² and laborers.²³ In addition, specific lien rights are conferred upon railroads,²⁴ animals,²⁵ and public works.²⁶ The following discussion is intended to explain in a more detailed fashion the complex statutory requirements which must be understood and followed in Ohio in order to establish the "simple" right to a mechanic's lien.²⁷

¹³ *Palmer v. Tingle*, 55 Ohio St. 423, 45 N.E. 313 (1896).

¹⁴ See *Great So. Fire Proof Hotel Co. v. Jones*, 193 U.S. 532 (1904). The Supreme Court of the United States, exercising its independent judgment as to constitutionality, found the statute did not deprive the owner of his property without due process of law nor interfere with his liberty to contract. *Id.* at 549-50. See generally DEWITT § 5.

¹⁵ OHIO CONST. art. II, § 33.

Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and materialmen, their just dues by direct lien upon the property, upon which they have bestowed labor or for which they have furnished material. No other provision of the constitution shall impair or limit this power. *Ibid.*

¹⁶ 103 Ohio Laws 369-79.

¹⁷ 105 Ohio Laws 522-34.

¹⁸ *Chapel State Theatre Co. v. Hooper*, 123 Ohio St. 322, 175 N.E. 450, *aff'd per curiam*, 284 U.S. 588 (1931).

¹⁹ *West Side Lumber & Mfg. Co. v. Lancaster Paper Mill Co.*, 5 Ohio App. 253 (1915).

²⁰ OHIO REV. CODE § 1311.25.

²¹ OHIO REV. CODE §§ 1311.26-29.

²² OHIO REV. CODE § 1311.33.

²³ OHIO REV. CODE §§ 1311.34-37.

²⁴ OHIO REV. CODE §§ 1311.39-47.

²⁵ OHIO REV. CODE §§ 1311.48-51.

²⁶ OHIO REV. CODE §§ 1311.65-68.

²⁷ A discussion of the scope of the right is not attempted here. If questions arise in this area, one must look to the pertinent statute creating the right involved.

II. STATUTORY CONSTRUCTION

Since a mechanic's lien is a creature of statute, the courts will apply the general rules of statutory construction in determining and defining the rights, procedures, and remedies created by that statute.²⁸ The cases, however, reveal a conflict as to the proper rule to be applied. Some courts have interpreted the mechanic's lien statutes as creating no new substantive rights but rather as being remedial in character and have thus applied a rule of liberal construction.²⁹ However, the application of a conflicting rule, that laws in derogation of the common law are to be strictly construed, has led to a contrary interpretation.³⁰ In attempting to resolve this conflict, the Mechanic's Lien Act of 1913 provided that a rule of liberal construction should be applied "to secure the beneficial results, intents, and purposes thereof."³¹

Although it would seem that the courts should apply an equally liberal interpretation to those sections of the statute concerned with the creation or acquisition of the lien as well as to those sections concerned with the rights and remedies thereunder, such has not been the case.³² Notwithstanding the clear intent of the statute, the courts have adopted their own rule of construction. Thus, the statutory requirements are *strictly* construed when involved with questions regarding whether a lien attaches or whether there has been compliance with the steps necessary to perfect the lien.³³ After the existence of a lien has been determined, the statutes are *liberally* interpreted insofar as they are remedial or concern errors of procedure.³⁴

Though this distinction may seem confused and subject to criti-

²⁸ *Black River Lumber Co. v. Kent*, 124 Ohio St. 20, 176 N.E. 662 (1931); *Mahoning Park Co. v. Warren Home Dev. Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924).

²⁹ *Mack v. DeGraff & Roberts Quarries*, 57 Ohio St. 463, 49 N.E. 697 (1898); *Bullock v. Horn*, 44 Ohio St. 420, 7 N.E. 737 (1886).

³⁰ *In the Matter of Kinnane Co.*, 14 OHIO L. REP. 531 (S.D. Ohio 1916).

³¹ OHIO REV. CODE § 1311.24.

³² See DEWITT §§ 9-10.

³³ *Manpower, Inc. v. Phillips*, 173 Ohio St. 45, 179 N.E.2d 922 (1962); *Love Lumber Co. v. Reaser*, 4 Ohio App. 2d 354, 212 N.E.2d 655 (1964); *Union Sav. Bldg. & Loan Co. v. Amburgy*, 108 Ohio App. 82, 155 N.E.2d 518 (1958); *F. W. Winstel Co. v. Johnston*, 103 Ohio App. 525, 143 N.E.2d 730 (1957). *But see* *State v. Kauer*, 116 Ohio App. 412, 188 N.E.2d 434 (1960), which required "substantial compliance" with the statutory procedure.

³⁴ See *Robert V. Clapp Co. v. Fox*, 124 Ohio St. 331, 178 N.E. 586 (1931); *C. C. Constance & Sons v. Lay*, 122 Ohio St. 468, 172 N.E. 283 (1930); *Vitale Bros. Co. v. Wurtz*, 2 Ohio App. 2d 99, 206 N.E.2d 585 (1965).

cism,³⁵ the pitfalls can be avoided by scrutinizing the statutes and complying with all requirements. It must be remembered that the requirements hereinafter referred to in perfecting the lien are mandatory; thus, a failure in compliance will preclude establishment of the lien.

III. RIGHT TO A LIEN

A. *Persons Entitled to a Lien*

The basic Ohio statute³⁶ provides that any person or corporation, any subcontractor, laborer, or materialman of an original contractor, or any subcontractor who, under contract, performs labor or furnishes machinery, materials, or fuel for the construction, alteration, or repair of a building or improvement is entitled to a mechanic's lien. The breadth of the right, limited to the parties designated, depends upon statutory definition³⁷ as well as judicial interpretation.³⁸

Although the statute entitles a corporation as well as a person to a lien, it is a right qualified by applicable state corporate statutes. Thus, if the issue arises, a lien-claimant corporation must show that it is qualified to do business in Ohio³⁹ and, if it is a foreign corporation, that it is properly licensed within the state.⁴⁰

More difficult problems of interpretation are presented where a specific or professional service is rendered. Thus, architects, surveyors, engineers, attorneys, and abstractors do not perform "labor" and will generally be denied the right to a lien.⁴¹ Liens of archi-

³⁵ See *Gebhart v. United States*, 172 Ohio St. 200, 174 N.E.2d 615 (1961), wherein the court questioned the accuracy and applicability of such a distinction.

³⁶ OHIO REV. CODE § 1311.02.

³⁷ OHIO REV. CODE § 1311.01(B) defines "Materialman" as "all persons by whom any machinery, materials, or fuel are furnished . . ." OHIO REV. CODE § 1311.01 (C) defines "Laborer" as "any mechanic, workman, artisan, or laborer employed in or about any such work." OHIO REV. CODE § 1311.01(D) defines "Subcontractor" as "any person who undertakes to construct, alter, erect, improve, repair, remove, dig, or drill . . . under a contract with any person other than the owner."

³⁸ While it is clear that a materialman of a subcontractor is within the statutory class, the right of a materialman's materialman to a lien has generally been denied. *Botzum Bros. Co. v. Brown Lumber Co.*, 104 Ohio App. 507, 150 N.E.2d 485 (1957); *Ivorydale Lumber Co. v. Cincinnati Union Terminal Co.*, 45 Ohio App. 353, 187 N.E. 126 (1933). *But see* *Alsco, Inc. v. Munday*, 110 Ohio App. 446, 169 N.E.2d 556 (1959).

³⁹ *Dabney v. Rose Bros. Co.*, 47 Ohio App. 278, 191 N.E. 810 (1933).

⁴⁰ *Manhattan Terrazzo Brass Strip Co. v. A. Benzing & Sons*, 72 Ohio App. 116, 50 N.E.2d 570 (1943).

⁴¹ *Robert V. Clapp Co. v. Fox*, 124 Ohio St. 331, 178 N.E. 586 (1931).

tects⁴² and surveyors⁴³ have been upheld, however, where it was shown that the work performed went beyond the mere preparation of plans at a place divorced from the site of construction and involved the actual supervision of work. The rationale for these holdings is that the right to a lien is dependent upon the severability of the contract and only attaches as security for the work done at the site.

B. Labor Performed and Materials Furnished

The Ohio Mechanic's Lien statute enables a specific class of creditor to elevate himself to the preferred class of lienor.⁴⁴ To do so, the party claiming such preference must affirmatively show that he has *performed labor or furnished materials*. Thus, a lien can be acquired for work or labor upon, or machinery, material, or fuel furnished for, watercraft, buildings, bridges, wells (other than those for gas and oil), and landscaping.⁴⁵ A similar lien can be obtained upon gas and oil wells,⁴⁶ and a lien can also arise from the private construction or repair of streets, sidewalks, and ditches.⁴⁷ Moreover, as previously mentioned,⁴⁸ liens are given for specific work performed and for materials furnished.

(1) *Performing Work or Labor*.—The statute provides a right of lien to "every person or corporation who performs work or labor upon" a structure.⁴⁹ Originally, this was interpreted as requiring a direct and immediate visible enhancement in the value of the prop-

⁴² *Stark v. McConnell*, 22 Ohio Op. 123 (C.P. 1940).

⁴³ *Kline v. Federal Ins. Co.*, 152 N.E.2d 911 (Ohio C.P. 1958).

⁴⁴ OHIO REV. CODE § 1311.13.

⁴⁵ OHIO REV. CODE § 1311.02 provides a lien right for constructing, altering, or repairing watercraft, or for erecting, altering, repairing, or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure, or gas pipe line, or well other than a well drilled or constructed for the production of oil or gas, or who furnishes tile for the drainage of any lot or land, or who does work or labor or furnishes material for the improvement, enhancement, or embellishment of real property by seeding, sodding, or the planting thereon of any shrubs, roses, trees, plants, vines, small fruits, flowers, or nursery stocks of any kind, or by grading, or filling to establish a grade

⁴⁶ OHIO REV. CODE § 1311.021 provides a lien right for "digging, drilling, boring, operating, completing, or repairing any well drilled or constructed for the production of oil or gas, or for altering, repairing, or constructing any oil derrick, oil tank, or leasehold production pipe line"

⁴⁷ OHIO REV. CODE § 1311.03 provides a lien right for "construction, alteration, or repair of any street, turnpike, road, sidewalk, way, drain, ditch, or sewer"

⁴⁸ See notes 20-26 *supra* and accompanying text.

⁴⁹ OHIO REV. CODE § 1311.02.

erty.⁵⁰ The attachment-to-the-realty concept is no longer absolute, the courts having noted a distinction between a lien for work and labor "upon" a building, and the furnishing of machinery, materials, or fuel "for" a given structure. Thus, it is required that work or labor be rendered either "upon" the structure or "upon" the premises where the structure is being erected. The furnishing "for" clause, however, requires only that the material be suitable and necessary to the purpose, requirement, or character of the building.⁵¹ Applying this distinction, one may have a mechanic's lien for labor performed in hauling to the site items which will later become a part of the building.⁵² As a general rule, therefore, the term "labor" is used in its ordinary sense and implies the personal work of an individual.⁵³

(2) *Furnishing Machinery, Material, or Fuel.*—The rationale for a mechanic's lien is that one who enhances the value of real property by furnishing materials should have security for the value of such materials. The question presented then becomes: When are the goods furnished such that the supplying party is entitled to a security interest? This question has been characterized as one of passage of title, as where the ownership and right to possession have passed from the lien claimant to the owner or principal contractor.⁵⁴ It has also been characterized by reference to whether the delivery has been made in accordance with the terms of the contract.⁵⁵ Neither delivery alone nor use of the materials in the structure are sufficient in themselves to give rise to a lien right.⁵⁶

In order to meet the furnishing requirement, it must be shown that the goods were ordered for purposes of construction and that they were delivered in good faith, under the premise that the goods were needed for the structure.⁵⁷ At the time that the goods are sold, therefore, it is not necessary that there be an understanding that the

⁵⁰ See DEMANN § 6.1.

⁵¹ Robert V. Clapp Co. v. Fox, 124 Ohio St. 331, 337, 178 N.E. 586, 588 (1931). This case was followed in Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co., 101 N.E.2d 408 (Ohio C.P. 1950).

⁵² Indemnity Ins. Co. of No. America v. Portsmouth Ice, Coal & Bldg. Material Co., 122 Ohio St. 439, 172 N.E. 152 (1930).

⁵³ Manpower, Inc. v. Phillips, 173 Ohio St. 45, 179 N.E.2d 922 (1962).

⁵⁴ Franklin Bank v. City of Cincinnati, 8 Ohio N.P. 517 (1900). See also Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co., 101 N.E.2d 408 (Ohio C.P. 1950).

⁵⁵ King, Gilbert & Warner v. Ship Bldg. Co., 50 Ohio St. 320, 34 N.E. 436 (1893).

⁵⁶ See DEMANN § 6.1.

⁵⁷ Quality Heating Supply Co. v. Buckeye Loan & Bldg. Co., 105 Ohio App. 369, 148 N.E.2d 88 (1957).

material will be used in the structure, because a lien attaches when material is "furnished" and not when it is "used." Similarly, a materialman who in good faith delivers materials to a building site may claim a lien for the value of those materials despite the fact that they are subsequently used at another site.⁵⁸

The problem of defining "materials" has largely been avoided in Ohio through specific statutory provision. It is provided that lubricants and other petroleum products, dynamite and other explosives, and hauling and delivery machinery are materials which may be the subject of a lien.⁵⁹ Notwithstanding the clear statutory language, the courts have been required to determine certain questions regarding materials. Thus, where tools remain unused on a particular job but can be used for other jobs, they are still considered the personal property of the contractor and, not being used within the contract, cannot be subject to a lien.⁶⁰ The right to claim a lien for extras⁶¹ will depend upon the individual situation and the applicable contractual provisions. There can be no claim for work done to complete the contract, however unforeseeable that work may have been. But where the extra work is authorized, the right to a lien attaches to the original contract and is not a separate lien right.⁶²

C. *The Contract*

The mechanic's lien statute requires that the claim for which a lien is allowed must arise "by virtue of a contract, express or implied, with the owner, part owner, or lessee of any interest in real estate, or his authorized agent."⁶³ The statute and its predecessors require, as a precondition to the perfection and existence of a lien, that there be a valid contract such that a debtor-creditor relationship exists between the owner and the contractor.⁶⁴ Since proof of a con-

⁵⁸ *East End Lumber Co. v. Bennett*, 46 Ohio App. 104, 187 N.E. 786 (1933); *Constance Lumber Co. v. Gatton*, 11 Ohio L. Abs. 97 (Ct. App. 1931).

⁵⁹ OHIO REV. CODE § 1311.27.

⁶⁰ See *Indemnity Ins. Co. of No. America v. Portsmouth Ice, Coal & Bldg. Material Co.*, 122 Ohio St. 439, 172 N.E. 152 (1930).

⁶¹ An extra is something furnished in addition to or in excess of the contractual requirements.

⁶² DEMANN § 6.18.

⁶³ OHIO REV. CODE § 1311.02.

⁶⁴ *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960); *Mahoning Park Co. v. Warren Home Dev. Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924); *Choteau v. Thompson*, 2 Ohio St. 114 (1853); *Price Bros. Co. v. Walters*, 115 N.E.2d 12 (Ohio Ct. App. 1951).

tract is thus vital to establish the right to a lien, it follows that no lien can arise out of work done by a mere volunteer⁶⁵ or from that which is done gratuitously.⁶⁶

Interpretation of the contract which forms the basis for a lien is governed by the general rules of contract law. Thus, an express contract is proved by production of the document which incorporates the agreed terms of the parties.⁶⁷ An implied contract is proved when the terms may be inferred from the evidence offered as a matter of fact, not of law, making it reasonable from the surrounding circumstances to infer that a contract did exist.⁶⁸

The problem of determining who is an owner, part owner, or lessee within the statute for contractual purposes is lessened by statutory definition, which includes all legal or equitable interests in real estate upon which work is to be done and particularly includes the interests of a purchaser.⁶⁹ As to what constitutes an "authorized agent," reference is made to the ordinary rules of agency. However, it is specifically provided that the husband is the authorized agent of a wife who owns property.⁷⁰

IV. PERFECTING THE LIEN

Because a mechanic's lien exists solely by virtue of statute, all of the procedural requirements must be met before an enforceable lien is created. The two basic requirements to be discussed in detail are, first, the service of the sworn statements of the contractor and subcontractors on the owner and, second, the filing of an affidavit with the county recorder. The lien is deemed to be perfected from the time the last of these two requirements is performed,⁷¹ as long as both acts occur within sixty days from completion of performance.⁷² It cannot be overemphasized that the procedure for perfecting a mechanic's lien is mandatory, and in that respect the courts will strictly construe the statutory requirements.

⁶⁵ Choteau v. Thompson, *supra* note 64.

⁶⁶ King, Gilbert & Warner v. Ship Bldg. Co., 50 Ohio St. 320, 34 N.E. 436 (1893).

⁶⁷ 21 OHIO JUR. 2D *Evidence* § 196 (1956).

⁶⁸ Gebhart v. United States, 172 Ohio St. 200, 174 N.E.2d 615 (1961).

⁶⁹ OHIO REV. CODE § 1311.01(A).

⁷⁰ OHIO REV. CODE § 1311.10. This provision only applies when the wife has "knowledge" of the work and does not expressly object.

⁷¹ 36 OHIO JUR. 2D *Mechanics' Liens* § 86 (1959).

⁷² OHIO REV. CODE §§ 1311.04, .06.

A. *Sworn Statement of Contractor and Subcontractors*

It is provided that a statement under oath, which recites the existence of a contract with the owner and the work or services performed under that contract, shall be made by the contractor and served upon the owner, part owner, lessee, mortgagee, or his agent whenever: (1) any payment of money becomes due from such owner; (2) the original contractor desires to draw any money under his contract; or (3) any mortgagee makes a written demand.⁷³ In considering the requirements which follow, it should be borne in mind that the purpose of the statement is twofold. It not only protects the owner from liens which exceed the amount of his contract, but it also prevents dealings between the principal contractor and the owner which might prejudice the rights of the subcontractors, laborers, or materialmen,⁷⁴ assuring them payment unless the owner protects himself by requiring the necessary statements at the time of any payment to the principal contractor.⁷⁵

That such statements are mandatory and a condition precedent to the perfection of a lien is evidenced by the denial of any lien or right of action to a contractor or subcontractor until the statements are made and furnished as provided.⁷⁶ Thus, it is not mandatory that a statement be furnished when money is paid, but it must be made to establish a right to a lien.

(1) *Form and Content of Statements.*—The statement of the contractor must include the name and address of every laborer, subcontractor, or person furnishing machinery, material, or fuel as well as the amounts due or to become due.⁷⁷ Similar sworn statements are required from each subcontractor, both statements to be accompanied by certificates signed by every person furnishing machinery, material, or fuel.⁷⁸ A form to be used for the statements and certificates is suggested in section 1311.04 and while compliance with the statutory form⁷⁹ is not absolutely required, a substan-

⁷³ OHIO REV. CODE § 1311.04.

⁷⁴ *Berea Block & Supply Co. v. Bridges*, 178 N.E.2d 844 (Ohio Ct. App. 1961).

⁷⁵ See *B. A. M., Inc. v. McDonald*, 5 Ohio App. 2d 166, 214 N.E.2d 267 (1965).

⁷⁶ OHIO REV. CODE § 1311.04. See also *Mahoning Park Co. v. Warren Home Dev. Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924) (decided under identical predecessor to OHIO REV. CODE § 1311.04); *Dealers Lumber & Coal Co. v. Peter A. Marchi, Inc.*, 170 N.E.2d 257 (Ohio Ct. App. 1960).

⁷⁷ OHIO REV. CODE § 1311.04.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

tial compliance is necessary. It should be noted that the mere sending of a bill is not the furnishing of a statement.⁸⁰

(2) *Statement of the Contractor.*—The contractor must file such statements with the owner, part owner, or lessee within the sixty days required by statute.⁸¹ The fact that all laborers and subcontractors have been paid in full and no claims are outstanding cannot justify the failure to furnish a statement.⁸² Compliance with the statutory requirement cannot be waived by the owner nor avoided by the contractor or subcontractor, nor does the failure of the owner to ask for a statement constitute a waiver of the contractor's obligation.⁸³ While the primary obligation to furnish a statement may not be waived, a written waiver of lien, release, or receipt may be furnished in lieu of the certificate of a materialman.⁸⁴ Where the contractor or subcontractor is unable to locate within the county the owners or others upon whom service of a statement is required, he is excused from fulfilling this requirement as a condition precedent to perfecting a lien or instituting suit.⁸⁵ It is further provided that where no liens are perfected within the sixty-day period, the failure of the contractor to furnish a statement shall not be a bar or defense in a suit to collect a claim.⁸⁶

(3) *Statement of the Subcontractors.*—The subcontractor has the same rights and obligations under section 1311.04 of the Ohio Revised Code and is subject to the same rules as those affecting the contractor. The major distinction is that the subcontractor is required to provide his statement only to the contractor unless otherwise demanded by the owner.⁸⁷

(4) *Demand by the Owner or Lien Claimant.*—Since the statute creates a right against the owner, part owner, or lessee, it also provides that such party may protect his interests and make written demand upon the contractor or any subcontractor for the required

⁸⁰ In the Matter of Don Evans, Inc., 157 N.E.2d 766 (Ohio P. Ct. 1959).

⁸¹ OHIO REV. CODE § 1311.04.

⁸² Ulmer v. Portage Constr. & Fin. Co., 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925) (decided under identical predecessor of OHIO REV. CODE § 1311.14); Mahoning Park Co. v. Warren Home Dev. Co., 109 Ohio St. 358, 142 N.E. 883 (1924).

⁸³ In the Matter of The Kinnane Co., 14 OHIO L. REP. 531 (S.D. Ohio 1916).

⁸⁴ OHIO REV. CODE § 1311.04.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* Schuhholz v. Walker, 111 Ohio St. 308, 145 N.E. 537 (1924); Ulmer v. Portage Constr. & Fin. Co., 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925).

statements at any time during the progress of the work.⁸⁸ The failure to comply with such demand within ten days subjects the delinquent party to a liability of one hundred dollars in addition to the actual damages arising from such refusal or neglect.⁸⁹ The failure may also result in the forfeiture of his right to a lien.⁹⁰

A reciprocal right of demand is created in the lien claimant either to obtain the statements of contractors and subcontractors or to be afforded an opportunity to make copies thereof. A failure to comply within five days of such demand subjects the refusing party to a liability of one hundred dollars plus the actual damages resulting from the neglect or refusal.⁹¹

(5) *Payment by the Owner.*—Any payments made before the required statements are furnished or without the retention of sufficient funds to make payment according to said statements and certificates are illegal and in violation of the rights of the parties intended to be benefited.⁹² The owner, part owner, or lessee must bear all risk for any payments made during the sixty-day period following completion if the required statement has not been made. Any payment made during that time will not be effective to defeat any lien of any subcontractor, materialman, or laborer.⁹³ However, where such parties participated in the distribution of funds, their right to a lien will abate to the extent of such participation.⁹⁴

Payments made after receipt of the statements must be made according to the respective rights of the parties as evidenced by such statements and by the attached certificates. All payments so made to such contractors, subcontractors, laborers, and materialmen are treated as if made to the original contractor and the payor is released from further liability to the extent of the payments made.⁹⁵

B. Affidavit for Lien

The second requirement with which every person seeking to attain the status of a lienholder must comply is the making of an

⁸⁸ OHIO REV. CODE § 1311.04. The right of demand also extends to the contractor seeking the statements of a subcontractor.

⁸⁹ *Ibid.*

⁹⁰ OHIO REV. CODE § 1311.12.

⁹¹ *Ibid.*

⁹² OHIO REV. CODE § 1311.04.

⁹³ OHIO REV. CODE § 1311.05.

⁹⁴ See *Chapel State Theatre Co. v. Hooper*, 123 Ohio St. 322, 175 N.E. 450, *aff'd per curiam*, 284 U.S. 588 (1931); *Quality Heating Supply Co. v. Buckeye Loan & Bldg. Co.*, 105 Ohio App. 369, 148 N.E.2d 88 (1957).

⁹⁵ OHIO REV. CODE § 1311.04.

affidavit for lien which recites that work was performed or materials furnished at the owner's property and that payment is due and owing. The affidavit must be entered into the public records by filing with the county recorder in the county of performance.⁹⁶

(1) *Form and Content.*—The mandatory contents of such affidavit are set out by the statute.⁹⁷ First, the affidavit must show the amount due, but there is no statutory requirement to itemize.⁹⁸ The words "over and above all legal setoffs" after the stated amount are essential to the validity of the lien, the omission of this phrase being fatal.⁹⁹ The lien claimant is bound by the contents of the affidavit, and, where the amount due is understated, the deficiency may not later be supplied by evidence.¹⁰⁰ However, if the affidavit states an amount in excess of that found to be due on the contract, the lien is not invalid in the absence of a fraudulent misrepresentation.¹⁰¹

The second requirement is a description of the property to be charged with the lien. As a general rule, the sufficiency of such description is a question of fact for the trial court and does not require complete technical accuracy. The description necessary is one which will enable a person familiar with the locality to identify the property.¹⁰²

As a third requirement, the name and address of the person to or for whom such material was furnished or labor performed is required. In the case of an original contractor, this person would be the owner, part owner, or lessee, while in the case of a subcontractor, materialman, or laborer, either the original contractor or a subcontractor would be named.¹⁰³

Furnishing the name of the owner, part owner, or lessee, if known, is the fourth requirement. If the name is not known to the lien claimant, then the affidavit does not fail for either the omis-

⁹⁶ OHIO REV. CODE § 1311.06.

⁹⁷ *Ibid.*

⁹⁸ *Tinke Lumber Co. v. Lay*, 32 OHIO L. REP. 392 (Ct. App. 1930). This applies even though performance was at different times, if the work was done under a contract for a fixed sum. *Thomas v. Huesman*, 10 Ohio St. 152 (1859).

⁹⁹ *C. C. Constance & Sons v. Lay*, 122 Ohio St. 468, 172 N.E. 283 (1930).

¹⁰⁰ *Ibid.*

¹⁰¹ *Thomas v. Huesman*, 10 Ohio St. 152 (1859). See *Durrel Paint & Varnish Co. v. Arnold*, 105 Ohio App. 172, 152 N.E.2d 9 (1957), where the falsification in a subcontractor's affidavit precluded a valid lien.

¹⁰² *Grimm Iron Works Co. v. Frederick*, 25 Ohio Op. 349 (C.P. 1941). See also *Shannon Co. v. Wurlitzer*, 45 Ohio App. 194, 186 N.E. 879 (1932); *Delskamp Paint & Glass Co. v. Stotter*, 28 Ohio N.P. (n.s.) 451 (C.P. 1931).

¹⁰³ OHIO REV. CODE § 1311.06.

sion or the mistaken identification of the owner. It obviously follows, however, that an intentional misrepresentation would defeat the right to a lien.¹⁰⁴ In the case of joint owners, a materialman is not required to name both, but the naming of one owner subjects only the interest of the party identified to the operation of the lien.¹⁰⁵ The fifth and final requirement is the inclusion of the name and address of the lien claimant.

Section 1311.06 of the Ohio Revised Code sets forth a form for the affidavit which may be followed but which is not mandatory.¹⁰⁶ The affidavit will be considered sufficient so long as it provides the information required by the statute.¹⁰⁷

(2) *Verification, Filing, and Recording.*—"Such affidavit may be verified before any person authorized to administer oaths, whether attorney for the owner, lien claimant, or other party interested or not . . ." ¹⁰⁸ The affidavit must be sworn to absolutely and not upon information and belief,¹⁰⁹ but it is not required that the affiant have personal knowledge of all the facts contained therein. After the time for filing has expired, the affidavit may neither be amended nor reformed in an equity action.¹¹⁰ Although a lien claimant is bound by the contents of the affidavit as filed, there should be no objection to the filing of a second corrected affidavit within the statutory period.¹¹¹

The affidavit must be filed within sixty days of the last performance of labor or furnishing of material.¹¹² Although a statement of the date of last performance is not one of the *enumerated* requirements, the suggested affidavit form provides for this date. Moreover, it has been determined that the inclusion of such a statement is mandatory and essential to the lien's validity.¹¹³

¹⁰⁴ DEWITT § 155.

¹⁰⁵ *Capital City Lumber Co. v. Ellerbrock*, 177 Ohio St. 159, 203 N.E.2d 244 (1964).

¹⁰⁶ *Love Lumber Co. v. Reaser*, 4 Ohio App. 2d 354, 212 N.E.2d 655 (1964).

¹⁰⁷ *Bakos v. Lorain Lumber & Mfg. Co.*, 15 Ohio L. Abs. 147 (Ct. App. 1933).

¹⁰⁸ OHIO REV. CODE § 1311.06.

¹⁰⁹ See *Gill v. Konvisser*, 32 Ohio Ct. App. 542, 543 (1914). The stating of the facts to be true "as he verily believes" was not sufficient.

¹¹⁰ *Love Lumber Co. v. Reaser*, 4 Ohio App. 2d 354, 212 N.E.2d 655 (1964); *State v. Kauer*, 116 Ohio App. 412, 188 N.E.2d 434 (1960).

¹¹¹ DEWITT § 171.36. See 36 OHIO JUR. 2D *Mechanics' Liens* § 80 (1959).

¹¹² OHIO REV. CODE § 1311.06. An exception is provided which allows the filing of a lien upon gas and oil wells during a 120-day period. OHIO REV. CODE § 1311.021.

¹¹³ *Ulmer v. Portage Constr. & Fin. Co.*, 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925).

The language of the statute requiring goods to be "furnished at the building" does not require an actual delivery. Rather, a constructive delivery will be acceptable, under a liberal construction of the meaning of "furnished."¹¹⁴ The question then arises as to what is a sufficient "furnishing" or "performance" from which to begin the statutory period. Because additional labor and materials are often required, the courts will carefully scrutinize such items to determine whether they are a necessary incident of the contract and performed in good faith or merely an attempt to extend time.¹¹⁵ But where there is a disagreement between the owner and the contractor as to whether the contract has been fully performed, a materialman who acts in good faith at the request of the contractor fixes a new date of last delivery for the filing of his affidavit.¹¹⁶ The burden of proof is upon the contractor to show performance within sixty days prior to the filing of the affidavit for lien.¹¹⁷

No extension of the filing time is allowed either for work done voluntarily to cure a defective performance¹¹⁸ or for furnishing small items as afterthoughts.¹¹⁹ Such actions are considered incidental to the contract and necessary to completion of performance according to its terms. Similarly, separate contracts cannot be tacked together so as to extend the time for taking a lien.¹²⁰ However, where the ability to perform work according to the contract is suspended by the owner, either expressly, by the owner's request,¹²¹ or impliedly, by abandonment¹²² or through his affirmative act,¹²³ the time for filing is extended. The contractor's abandonment or death, however, ter-

¹¹⁴ To protect his right to a lien, it has been suggested that where there has been no actual delivery the claimant should file his lien within sixty days from the date of last delivery to the place specified in the contract. DEWITT § 157.

¹¹⁵ *Walter v. Brothers*, 42 Ohio App. 15, 181 N.E. 554 (1932). Work done at the request of the owner and with his knowledge is generally sufficient to establish a new period.

¹¹⁶ *Quality Heating Supply Co. v. Buckeye Loan & Bldg. Co.*, 105 Ohio App. 369, 148 N.E.2d 88 (1957).

¹¹⁷ *Bakos v. Lorain Lumber & Mfg. Co.*, 15 Ohio L. Abs. 147 (Ct. App. 1933).

¹¹⁸ *Walter v. Brothers*, 42 Ohio App. 15, 181 N.E. 554 (1932).

¹¹⁹ *Bernard Lumber Co. v. Molinaro*, 17 Ohio L. Abs. 21 (Ct. App. 1934).

¹²⁰ *King, Gilbert & Warner v. Ship Bldg. Co.*, 50 Ohio St. 320, 34 N.E. 436 (1893).

¹²¹ *F. Pedretti & Sons v. Stichtenoth*, 3 Ohio C.C. Dec. 564 (1892).

¹²² *Groff v. Harris*, 18 Ohio L. Abs. 101 (Ct. App. 1934).

¹²³ See *Ulmer v. Portage Constr. & Fin. Co.*, 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925) in which appointment of a receiver suspended the filing period for a reasonable time.

minates all contractual relations, and the period for filing runs from the date of last performance.¹²⁴

The recording of the affidavit must be effected in the county where the labor was performed or the material furnished.¹²⁵ The county recorder endorses the date and hour of filing upon the affidavit, recording the event in a lien register; the right to enforce the lien then continues for six years.¹²⁶

(3) *Notice and Service.*—Within thirty days after filing, the lien claimant must furnish notice by service of a copy of the affidavit upon the owner, part owner, or lessee of the premises, or their agents.¹²⁷ This requirement, as are all others, is mandatory, and noncompliance will invalidate the lien.¹²⁸ The problem of who is the "owner" within the meaning of the statute has arisen where the contracting owner has sold the property prior to the expiration of the lien period. The early decisions placed liability upon the contracting owner rather than the purchasing owner, because labor was performed and materials furnished on the strength of the contract and on the relationship with that owner.¹²⁹ The Ohio Supreme Court has since determined, however, that service shall be made upon the owner of the property at the time of service of the affidavit.¹³⁰ Thus, as between two innocent parties, the spirit of the Mechanic's Lien Act prefers the laborer and places the burden of investigation and knowledge of all claims upon the purchasing owner. Where the owner is deceased at the time of notice, his executor or administrator accedes to all of his rights and liabilities.¹³¹

The statutory requirement that the lien claimant "serve on the owner" a copy of the affidavit has been interpreted to require per-

¹²⁴ See DEMANN § 9.11.

¹²⁵ OHIO REV. CODE § 1311.06.

¹²⁶ OHIO REV. CODE § 1311.13.

¹²⁷ OHIO REV. CODE § 1311.07. However, an attorney employed for an action pending in court is not an agent upon whom service may be made. *Mahoning Park Co. v. Warren Home Dev. Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924).

¹²⁸ *Suburban Heating Co. v. Lougher*, 4 Ohio App. 2d 343, 212 N.E.2d 659 (1964); *Edgemont Coal & Cement Co. v. Gaylor*, 100 Ohio App. 42, 133 N.E.2d 651 (1955). However, substantial compliance with the act, as by serving a copy of the affidavit before it is filed, does not invalidate the lien. See *Ulmer v. Portage Constr. & Fin. Co.*, 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925).

¹²⁹ *Gill v. Konvisser*, 32 Ohio Ct. App. 542 (1914); *Fisher v. Jacobs*, 24 Ohio N.P. (n.s.) 505 (C.P. 1920).

¹³⁰ *Schuhholz v. Walker*, 111 Ohio St. 308, 145 N.E. 537 (1924).

¹³¹ OHIO REV. CODE § 1311.21.

sonal service.¹³² However, three alternatives to personal service are provided by statute. Where the owner or others cannot be found within the county where the property is located, valid service may be effected by posting a copy of the affidavit in a conspicuous place¹³³ on the premises within ten days after the expiration of the thirty-day period.¹³⁴ The second alternative provides that the sheriff of the county where the owner resides may effect service in any manner and form acceptable in a civil action for money only.¹³⁵ Finally, service may be made by registered letter to the last known place of residence of the party to be served.¹³⁶ Proof of such registered mail delivery is conclusive proof of service.¹³⁷ But it should be noted that the lien claimant is required at his peril to ascertain the owner's last known place of residence.¹³⁸

C. Preliminary Notice

Because the right to a lien is dependent upon the inclusion of the claim in the statement and affidavit, provision is made whereby a party furnishing materials or performing labor may notify the owner of the omission of his claim by the contractor or subcontractor.¹³⁹ This provision is intended to provide an extra safeguard to insure proper payment, the furnishing of such notice not being a prerequisite to the attaching of a lien.¹⁴⁰ In addition, it informs the owner of the identity of any parties the contractor or subcontractor may have employed and allows him to take the necessary action to protect himself against loss.

¹³² *Crane Co. v. Koper Heating Co.*, 53 Ohio App. 403, 5 N.E.2d 338 (1936). The court invalidated resident service, finding that since the legislature did not provide for it, the court was without authority to read it into the statute. See also *DEWITT* § 175 (Holmes Supp. 1950).

¹³³ Nailing a copy to a post on the land is sufficiently conspicuous. *Baynes v. McKee*, 119 N.E.2d 122 (Ohio Ct. App. 1951).

¹³⁴ OHIO REV. CODE § 1311.07. It is the lien claimant's responsibility to determine the owner's location, and the lien is invalid if not properly served upon the owner in possession of the land. *Becker Plumbing Supply Co. v. Rialto Improvement Co.*, 36 Ohio App. 102, 172 N.E. 700 (1930).

¹³⁵ OHIO REV. CODE § 1311.19. Under this section, service by publication would be valid. See *Crandall v. Irwin*, 139 Ohio St. 253, 39 N.E.2d 608, *aff'd on rehearing*, 139 Ohio St. 463, 40 N.E.2d 933 (1942).

¹³⁶ OHIO REV. CODE § 1311.19.

¹³⁷ *Ibid.* Production of a return receipt would seemingly be sufficient, whereas a mere conclusion based upon the custom or practice of service is not sufficient. *Makari v. Hewitt*, 16 Ohio L. Abs. 130 (Ct. App. 1934).

¹³⁸ *Edgemont Coal & Cement Co. v. Gaylor*, 100 Ohio App. 42, 133 N.E.2d 651 (1955).

¹³⁹ OHIO REV. CODE § 1311.05.

¹⁴⁰ *Mayer v. Nemeth*, 11 Ohio App. 362 (1919).

The notice must be written and must contain a description of the labor performed and the material furnished either as of that date or expected to be furnished in the future. A claim as to the amount then due or to become due together with a description of the premises where such labor and materials were furnished, including the street and number, must also be provided. The recommended form for the notice is set out in the statute.¹⁴¹

The notice is sufficient if served at any time before final payment or distribution, and, upon such service, the party providing notice is entitled to the same rights as if he had been included in the affidavit of the contractor or subcontractor.¹⁴² Because the owner is thereupon bound just as if the claim were included in the statements of the contractor or subcontractor, the risk of all payments after service of the notice is upon the owner.¹⁴³ It is further provided that once payment is made the owner may rely upon the truth and accuracy of the statements and is not liable for errors in or omissions of names or amounts.¹⁴⁴ However, where the owner makes payment according to the statements and notices, he will not be liable to any subcontractor, materialman, or laborer for any greater amount than he contracted to pay the original contractor.¹⁴⁵

V. PRIORITIES

It is obvious that the lienor is only interested in securing proper payment for his labor and is thus prompted to invoke the procedures discussed above to establish and perfect his right to a lien. However, as is often the case in actual practice, when the lienor seeks to exercise that right against the owner, he is in competition with other lienholders and secured creditors. Thus, the question of the priority of one's lien right over that of others may determine the extent of any recovery.

A. *Among and Between Mechanics' Lienors*

Mechanics' liens are given a statutory priority over all other titles, liens, or encumbrances to the premises which may be estab-

¹⁴¹ OHIO REV. CODE § 1311.05.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Chapel State Theatre Co. v. Hooper*, 123 Ohio St. 322, 175 N.E. 450, *aff'd per curiam*, 284 U.S. 588 (1931); *Berea Block & Supply Co. v. Bridges*, 178 N.E.2d 844 (Ohio Ct. App. 1961).

lished subsequent to the commencement of any construction, excavation, or improvement.¹⁴⁶ It follows, therefore, that there would be no priority over liens existing prior to such commencement.¹⁴⁷ Though the right has not been perfected by the filing of the required statements and affidavits, the lien is considered to relate back to the date the first labor was performed or first material furnished under the general contract rather than that done under each separate contract.¹⁴⁸

Since all liens date back to the commencement of work, it is provided that there shall be no priority among the same class of lienholders on the same job.¹⁴⁹ This applies only where the claims arise under the contract for the same improvement project, priority not relating back to the commencement of some improvement unrelated to that project.¹⁵⁰ However, an exception is provided which gives liens of manual laborers a priority to the extent of their labor performed during the thirty-day period which precedes the date of performance of the last labor.¹⁵¹

As between lien claimants of different classes from the same work or project, the statute sets forth the priority of the parties. The right of a subcontractor's lien precedes any lien taken or to be taken by a principal contractor; and the right of a laborer, mechanic, or materialman to a lien is superior to a contractor's or subcontractor's lien, whether existing or still to be taken.¹⁵²

B. Mechanics' Lienors and Other Encumbrancers

(1) *Construction Mortgages.*—Prior to the Mechanic's Lien Law of 1913, the right to a lien was given only to parties contracting with the owner; hence, a mortgagee could readily identify lien claimants against the property before the mortgage was recorded. With this knowledge he would determine his course of action, usually paying off such claimants or obtaining a waiver of any lien rights.¹⁵³ However, after 1913 any parties, without regard to priv-

¹⁴⁶ OHIO REV. CODE § 1311.13(B).

¹⁴⁷ *Neil v. Kinney*, 11 Ohio St. 58 (1860).

¹⁴⁸ OHIO REV. CODE § 1311.13. *Geer v. Tuggle*, 22 Ohio N.P. (n.s.) 129 (C.P. 1919) (interpreting identical predecessor to OHIO REV. CODE § 1311.13); *DEMANN* § 10.2.

¹⁴⁹ OHIO REV. CODE § 1311.13(A).

¹⁵⁰ *Fryman v. McGhee*, 108 Ohio App. 501, 163 N.E.2d 63 (1958).

¹⁵¹ OHIO REV. CODE § 1311.13(A). *Lake Lumber Co. v. Watson*, 133 N.E.2d 925 (Ohio C.P. 1956).

¹⁵² OHIO REV. CODE § 1311.15.

¹⁵³ *DEWITT* § 219, at 343.

ity, who performed labor or furnished materials would have a right to a lien which related back to the beginning of construction. The mortgagee would have no alternative but to take the mortgage subject to all claims arising before or after recording.¹⁵⁴ In order to avoid such a harsh result and to promote credit financing, the mortgagee who furnishes money for the completion of an improvement project after the rights of mechanics and materialmen have attached is granted a statutory priority over all mechanics' liens filed after the mortgage is recorded.¹⁵⁵

The right to the preference is qualified by requiring compliance with specific conditions. First, the mortgage must be given and the proceeds actually used to improve real estate or to eliminate prior encumbrances or both. Second, the mortgage must contain the correct name and address of the mortgagee. Lastly, it must contain a covenant between the mortgagor and mortgagee authorizing the mortgagee to do all things provided to be done by said mortgagee under section 1311.14.¹⁵⁶ It is to be noted that only a bona fide mortgage is entitled to priority.¹⁵⁷ However, it is specifically provided that mortgages contemplated under this statute "shall be liberally construed in favor of such mortgagees, a substantial compliance by such mortgagees being sufficient."¹⁵⁸

The establishment of priorities between mortgagees and lienholders has no bearing upon a mortgage filed for record before construction has started,¹⁵⁹ and work or construction upon mortgaged land will generally be subject to the security interest of such mortgages. Similarly, a mechanic's lien attaching prior to the recording of a mortgage takes precedence over that mortgage.¹⁶⁰ Therefore, the priority between a mechanic's lien and a mortgagee¹⁶¹ is not de-

¹⁵⁴ See *Rider v. Crobaugh*, 100 Ohio St. 88, 125 N.E. 130 (1919).

¹⁵⁵ OHIO REV. CODE § 1311.14.

¹⁵⁶ See *Ulmer v. Portage Constr. & Fin. Co.*, 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925).

¹⁵⁷ *Square Lumber Co. v. Goldman*, 26 Ohio App. 130, 159 N.E. 130 (1926).

¹⁵⁸ OHIO REV. CODE § 1311.14.

¹⁵⁹ *A. G. Sharp Lumber Co. v. Manus Homes, Inc.*, 189 N.E.2d 447 (Ohio Ct. App. 1961).

¹⁶⁰ *Ulmer v. Portage Constr. & Fin. Co.*, 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925).

¹⁶¹ Other provisions of the statute dealing with specific problems are: (1) the option of the mortgagee to complete the loan or withdraw as well as the order in which the mortgage fund must be distributed to entitle the mortgagee to the statutory priority; (2) the effect and application of payments made by the mortgagee; (3) notice to the mortgagee by laborers and materialmen of the amounts due or to become due; and

terminated by the effective date between the parties thereto but rather by the date of recording.¹⁶²

(2) *Vendor's Lien*.—The vendor's lien was a creature of equity, founded upon the concept of an implied trust.¹⁶³ However, it was a secret lien whereby the unpaid vendor, who clothed the vendee with apparent title, could come forth and assert his superior lien against a subsequent purchaser or encumbrancer.¹⁶⁴ To obviate the injustices that such a secretive right would create, Ohio has a statutory vendor's lien¹⁶⁵ which provides security for that part of the purchase money remaining unpaid. Thus, such a lien cannot arise until after title to the property has been conveyed to the purchaser-vendee. To cure the secrecy of the equitable lien, it is provided that such lien is ineffective against a purchaser, mortgagee, judgment creditor, or other encumbrancer¹⁶⁶ "unless there is a recital or a reservation of the lien in the deed, or in some instrument of record executed with the same formalities as are required for the execution of deeds and mortgages of land."¹⁶⁷ While this particular lien is now statutory, the principle of equitable liens is still present, as evidenced by the granting of such a right to a purchaser-vendee for the amount paid on the purchase price where the vendor breached an executory contract for sale of property.¹⁶⁸

(3) *Tax Liens*.—It has been determined that a state or federal tax lien has priority over a mechanic's lien. By statute,¹⁶⁹ the state has a first lien for taxes and assessments upon the land and lots described in the delinquent tax list.¹⁷⁰ Where a federal tax lien is in-

(4) requests by contractors, subcontractors, materialmen, and laborers for a statement by the mortgagee. OHIO REV. CODE § 1311.14; 36 OHIO JUR. 2d *Mechanics' Liens* §§ 118-19 (1959); DEMANN §§ 10.7-16; DEWITT §§ 222-34.

¹⁶² *Lake Lumber Co. v. Watson*, 133 N.E.2d 925 (Ohio C.P. 1956); *Bayless v. Viney*, 21 Ohio L. Abs. 141 (Ct. App. 1935).

¹⁶³ *Smith v. Smith*, 37 N.E.2d 425 (Ohio Ct. App. 1941). The vendee was held to be a trustee of the vendor, receiving the conveyance and holding it for the use of the vendor until the purchase money was paid.

¹⁶⁴ See DEWITT § 210(a), at 336; ROCKEL, *MECHANICS' LIENS* § 163 (1909).

¹⁶⁵ 113 Ohio Laws 61 (1929); OHIO REV. CODE § 5301.26.

¹⁶⁶ This language would seem to include all persons asserting a lien against property and would thus include mechanics' liens. See DEWITT § 210(b), at 337.

¹⁶⁷ OHIO REV. CODE § 5301.26.

¹⁶⁸ *Cleveland Trust Co. v. Bouse*, 163 Ohio St. 392, 127 N.E.2d 7 (1955). The court pointed out that other courts have found no equity in granting the right to one and denying it to the other.

¹⁶⁹ OHIO REV. CODE § 5721.10.

¹⁷⁰ *Home Owners' Loan Corp. v. Tyson*, 133 Ohio St. 184, 12 N.E.2d 478 (1938) (dictum). See also *Ulmer v. Portage Constr. & Fin. Co.*, 26 Ohio N.P. (n.s.) 257 (C.P. 1923), *aff'd without report*, (Ohio Ct. App.), *motion to certify overruled*, 24 OHIO L. REP. 322 (1925).

volved, state law controls the determination of the taxpayer's legal interests in the property sought to be reached by such lien, and the federal law will determine the priority of competing liens.¹⁷¹ Thus it has been determined that a federal tax lien will be accorded priority over a mechanic's lien even though such lien has been perfected and suit instituted to foreclose the lien.¹⁷²

VI. CONCLUSION

The mechanic's lien is purely a statutory right created to provide a security interest in real property to those persons who added to the value of such property by their labor. This Note has been an objective explanation of the means which must be employed to establish that statutory right, no attempt having been made to criticize any single weakness or inequity. This does not mean that such defects do not exist. Certainly the overall complexity of the statutes is subject to criticism. However, more importantly, it appears that the basic purpose and intent of the mechanic's lien is at variance with the means employed by the statutes. The initial right was directed toward the large class of individual builders and laborers rather than the large-scale contractors and labor unions which are now predominant. Upon careful examination it appears that the class of persons benefited today renders the entire purpose of the statute subject to question.

There is no doubt that the contractor, materialman, or laborer had a bona fide need for some protection at the outset of the mechanic's lien legislation. The mid-nineteenth century economy was on a small scale; indeed, the thrust of the Industrial Revolution had not yet been felt. The economic society tended toward a dichotomy of wealthy landowners and skilled artisans in contrast to today's vast middle class. This meant that the owner was in a better position to assume the burden placed upon him by the lien laws, and the worker had greater need for their benefits. Thus, the potential liability of the landowner was not of so great a magnitude as to result in financial destruction, and the worker depended upon prompt payment for his day-to-day livelihood.

As the economy developed in the later nineteenth and early twentieth centuries, it became apparent that early lien laws were

¹⁷¹ *Aquilino v. United States*, 363 U.S. 509 (1960); *Geisinger v. East Ohio Gas Co.*, 197 N.E.2d 661 (Ohio C.P. 1963).

¹⁷² *United States v. White Bear Brewing Co.*, 350 U.S. 1010, *reversing* 227 F.2d 359 (7th Cir. 1955). See also *Shott v. Peoples Bank*, 105 Ohio App. 80, 151 N.E.2d 47 (1957).

inadequate. Through numerous legislative alterations, varying judicial interpretations, and finally a constitutional amendment,¹⁷³ a new Mechanic's Lien Act¹⁷⁴ was drafted and enacted. However, since 1915 there have been relatively few changes in Ohio's lien laws. Certainly the economy and the needs of owners and workers cannot be said to have remained static over this period.

The construction industry is big business today, and protection is not required at all levels of the industry. The owner-artisan relationship has been replaced by the corporation which deals with large contractors and trade unions. These groups need no protection, for both are well staffed with attorneys and command substantial financial resources. In practice, the individual homeowner and small businessman are those who are most affected by mechanic's lien actions. They cannot afford to deal with the largest and most reputable contractors, yet they are less able to assume the risk of a dishonest contractor, and they are without the legal advice necessary to comprehend the detailed and confusing statutory requirements. Can it not truly be said that this owner is the more innocent of the two parties? It is time for a hard look at the existing statutes and a reevaluation of the theory and purpose behind them. With the advances and changes in the economy during this century and those which may be expected in the future, a streamlining of existing statutes and a more equitable distribution of the risk of loss is necessary.¹⁷⁵

Though the lienor was given a security interest to protect himself against default by the owner, the real problem was created in the situation where the owner paid the contractor who in turn defaulted in payment to a subcontractor, materialman, or laborer.¹⁷⁶ As between the unpaid laborer and the owner who had paid the contractor, the equities balanced out in favor of the laborer, and thus the owner bore a double liability for the contractor's default. This choice has been justified by applying the theory of unjust enrichment. However, it is absurd to believe that paying twice for a single performance "enriches" the owner. How can the lienor claim a debt owing when there is no debt between himself and the owner? Ab-

¹⁷³ OHIO CONST. art. II, § 33.

¹⁷⁴ 103 Ohio Laws 369-79 (1913); 105 Ohio Laws 522-34 (1915).

¹⁷⁵ In other spheres of the commercial world, the Uniform Commercial Code governs various transactions by rules which recognize the existing needs of the parties. The stated purpose is "to simplify, clarify and modernize the law" and to recognize the custom and usages of commercial practice. UNIFORM COMMERCIAL CODE § 1-102.

¹⁷⁶ See Gosline, *The Ohio Mechanics' Lien Law*, 1 OHIO ST. L.J. 198, 204 (1935).

sent the statute, the lienor's cause of action would be against the contractor for breach of contract.

Since the right accorded the subcontractor, materialman, or laborer provides protection against a defaulting contractor, it appears that the remedy against the owner is misplaced. A more equitable solution would be to place the loss on the guilty party. Recognizing that there can be no remedy against an insolvent contractor, preventive legislation offers a solution.¹⁷⁷ The method most often employed in large scale construction to protect the owners from loss is to require the contractor to execute an indemnity bond which holds the owners harmless. If such a procedure were statutory, the risk would be shifted to the guilty party rather than the lesser of two innocent parties. The legislature could provide that a surety bond would run with the contractor's license, in an amount proportionate to his volume of business. While the cost of the bond could be passed to the owner as a part of the contract price, if the owner refused, a written waiver of the bond could be required.

In addition, the premium to be paid the insurance company would reflect the degree of honesty and solvency of the contractor. The greater burden of such a system would thus fall upon the less reputable contractor who causes the problem. Benefits would also accrue to the honest contractor by the general upgrading of the industry and by the elimination of those whose unsound practices undermine the public's confidence in contractors.

Whatever the solution, the need exists for change to benefit not only owners and contractors but also the public as well. Legislative attention should be focused on this too-long-forgotten area of the law.

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¹⁷⁷ See Comment, 14 U. MIAMI L. REV. 73, 97 (1959).